

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the matter of.

**RECEIVED**

JAN 23 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Request for Review by the Consorcio	)	
de Escuelas Y Bibliotecas de Puerto Rico	)	
of Decisions of the Universal Service	)	
Administrative Company	)	
	)	
Federal-State Board on Universal Service	)	CC Docket No 96-45
	)	
Changes to the board of Directors of the	)	
National Exchange Carrier Association, Inc	)	CC Docket No. 97-21
	)	
Schools and Libraries Universal Service	)	
Support Mechanism	)	CC Docket No. 02-6
	)	
Biblioteca Municipal Rincon, Luis Murioz Martin	)	Application No. 327608
Biblioteca Municipal de Juncos, Jose M Gallado	)	Application No 327616
Biblioteca Electronica Dr Carlos Hernandez Rodrig	)	Application No 329112
Biblioteca Publica Aguada	)	Application No. 329147
Biblioteca de la Ciudad Rosa M. Sanchez	)	Application No. 329153
Biblioteca Publica Camuy, Barrio Quebrada	)	Application No 329226
Biblioteca Publica Coamo, Julio Rivera Bermudez	)	Application No. 329245
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Biblioteca Publica Loriza	)	Application No 329318
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Biblioteca Publica Rio Grande	)	Application No. 329400
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Academia Alexandra	)	Application No. 329415
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Biblioteca Publica LaJas, La Parguera	)	Application No. 329519
Biblioteca Municipal Caguas	)	
Dr. Pedro Albizu Campo	)	Application No 329584
Biblioteca Publica Santa Isabel, Pedro M Alomar	)	Application No. 329590
Biblioteca Municipal De Cayey	)	Application No 329609
Biblioteca Publica Adjuntas	)	Application No. 329630

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Biblioteca Publica Anasco	)	Application No 329656
Biblioteca Publica Municipal Computadorizada	)	Application No 329675
Biblioteca Municipal de Corozal, Teofilo	)	Application No 329683
Maldonado	)	
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Biblioteca Publica Penuelas	)	Application No. 329940
Priaget Bilingual Academy of Manati, Inc.	)	Application No 329967
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Biblioteca Municipal de Bayamon Pilar Barboza	)	Application No 329990
Biblioteca Publica Toa Baja, Jaime Fonalledas Garr	)	Application No. 330045
Colegio Presbiteriano San Sebastian	)	Application No. 330178
Biblioteca Publica Villalba	)	Application No 330454
Colegio Marrimée, Inc	)	Application No 330580
Biblioteca Publica Salinas, Clemencia	)	Application No. 331495
Philemon Vda	)	
Biblioteca Publica Guayanilla	)	Application No 331546

To Wireline Competition Bureau

### **REQUEST FOR REVIEW**

Ramsey L. Woodworth  
Michelle A. McClure  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave , N.W , Suite 200  
Washington, D.C. 20036-3101  
Tel. (202) 728-0400  
Counsel for Consorcio de Escuelas y  
Bibliotecas de Puerto Rico

January 23, 2004

## TABLE OF CONTENTS

SUMMARY .....	iv
I     A RIGHT OF FIRST REFUSAL IN A SERVICE AGREEMENT IS NOT A COMPETITIVE BIDDING VIOLATION .....	3
II    THE SLD ERRED IN FINDING THAT EQUIPMENT REQUESTED IN CERTAIN FRNs IS NOT BEING USED IN ACCORDANCE WITH PROGRAM RULES .....	8
III   THE SLD ERRED IN FINDING THAT INSUFFICIENT INFORMATION WAS SUPPLIED IN CERTAIN FRNs .....	9
IV    THE DENIAL OF CERTAIN FRNs BECAUSE OF THE FUNDING CAP VIOLATED FCC RULES .....	11
V     DENIAL INCONSISTENT AND INADEQUATELY EXPLAINED .....	12
VI    CONCLUSION .....	13
EXHIBIT A FUNDING COMMITMENT DECISION LETTER	
EXHIBIT B MASTER SERVICES AGREEMENT	
EXHIBIT C APPLICANT FORM 471 (EXCERPT)	
EXHIBIT D APPLICANT FORM 471 (EXCERPT)	
EXHIBIT E APPLICANT FORM 471 (EXCERPT)	
EXHIBIT F RESPONSES TO SLD STAFF REQUESTS	
EXHIBIT G PENDING APPEAL WITHIN SLD CONCERNING DISCOUNT CALCULATION	

## **SUMMARY**

This Request for Review seeks reconsideration of the SLD's rejection of the requests for funding filed by members of CEBPR, a consortium of schools and libraries in Puerto Rico for various reasons but primarily due to a services agreement which was wrongly found to be violative of the competitive bidding procedures. In fact, the contractual provision works to guarantee CEBPR to obtain the lowest prices for services in accordance with the principles of the competitive bidding rules.

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To Wireline Competition Bureau

### **REQUEST FOR REVIEW**

Pursuant to Sections 54.719(c) and 54.721 of the Commission's rules, 47 C.F.R. Sections 54.719(c) and 54.721, the above-referenced applicants ("Applicants") and the Consorcio de Escuelas y Bibliotecas de Puerto Rico ("CEBPR") request review of the attached action (Exhibit A) of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company, dated November 24, 2003, denying all requests for funding contained the above-referenced applications.

In large part, the individual funding requests (FRNs) were denied for reason of a perceived “Bidding Violation ” More specifically, without further information or analysis, the SLD concluded as follows

“Contract earlier signed by applicant with vendor gave vendor right of first refusal to offer lowest price bid, which applicant agreed to if competing bids were received. This dampened competition and compromised the selection of the vendor for funding year 2002 ”

In addition, with no discernable pattern or consistency from application to application, specific FRNs were rejected for one of three other reasons: (1) the site specific discount as corrected by SLD exceeded the funding cap limit for 2002, (2) the service/product requested was not being used in accordance with program rules, or (3) the applicant had not provided sufficient justification to determine eligibility

As hereinafter shown, SLD’s terse analysis of the alleged Bidding Violation is wrong as a matter of law. Not only does no FCC program rule or SLD interpretative policy prohibit an applicant from according an existing service provider the right to match a lower price bid received in any contract rebidding process for extension of services, but SLD’s conclusion as to the competitive implications of such a contractual provision is completely wrong Such a contractual provision, not at all unusual in contracts for an ongoing service, fosters competition and can work only to guarantee the lowest marketplace price for the product or service. The other reasons put forth by SLD for the denial of specific FRNs are similarly without merit

**I. A Right of First Refusal in a Service Agreement Is Not a Competitive Bidding Violation.**

At the outset, it is important to understand the context in which the right of first refusal (hereinafter referred to as a “ROFR”) functions in this matter and what it does –

and does not – accomplish Applicants are members of CEBPR, a consortium of schools and libraries in Puerto Rico, which for program years 1 through 5 arranged for services to members pursuant to a Masters Services Agreement with Hispanic Information and Telecommunications Network, Inc (“HITN”) The Master Services Agreement (copy attached as Exhibit B) was entered into on January 29, 1998 for an initial five-year term<sup>1</sup>

In pertinent part, Section 3 of the Agreement provided as follows.

“In the event that USF competitive bidding requirements necessitate at any time during the Term of the Agreement it is subject to competitive bidding, PRCSL [now CEBPR] and the Schools and Libraries agree that if the Agreement does not result in the lowest bid price for Services similar to those provided for under this Agreement, HITN/DLS has a right of first refusal to offer a bid lower than the lowest price bid, which PRSCL and the Schools and Libraries agree they will accept.”

As a pre-existing contract under Section 54 511(c)(11) of the Rules, the Agreement was exempt from competitive bidding requirements in the first program year

Nonetheless, as a matter of practice and in accord with the Commission’s specific encouragement<sup>2</sup>, all services provided under the contract have been subjected by CEBPR to the Form 470 competitive bidding process in every program year, including year 1

This has been true both as to the applications of new CEBPR members taking service for the first time in a particular year and members renewing service in subsequent year(s).

This has been done simply to ensure that CEBPR members obtained the lowest possible

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<sup>1</sup> The initial five- year term ending January 29, 2003 was subsequently extended for an additional three-year period

<sup>2</sup> In approving the use of Master Services Agreements, the Commission provided that the date of the Master Agreement would determine exemption from competitive bidding requirements, but nonetheless encouraged parties to utilize the competitive bidding process *Federal-State Board on Universal Service, Fourth Order on Reconsideration*, FCC97-420, released December 30, 1997, paragraphs 230-235



cost for services each year. At the same time, by according the existing service provider, HITN, with the ability to continue to provide services over the term of the Master Services Agreement, provided it was willing to meet any lower priced bid that was received, the Agreement provided for a reasonable continuity and stability of service.

The ROFR provision thus functioned to provide a fair balance between CEBPR's objective to obtain the lowest price possible each year for services for its members with the service provider's reasonable expectancy of maintaining services over the multi-year term of the Master Services Agreement.<sup>3</sup> Simply put, the service provider retained the ability to continue to provide services for the agreed term, but only if it was prepared to meet a lower bid received in response to the Form 470 postings of CEBPR members.

In *Mastermind Internet Services, Inc* , 16 FCC Rcd. 4028 (2000), the Commission held that an applicant violates the competitive bidding rule when it surrenders control of the process to a service provider who is participating in the process through such acts as making a representative of the service provider a point of contact for bid information or allowing the service provider to participate in the bid evaluation process.<sup>4</sup> The ROFR provision at issue here does not raise that issue for the simple reason that it comes into play, if at all, only after the bid evaluation and selection process has been completed. It does not involve the service provider in the bid receipt and evaluation process in any way

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<sup>3</sup> As the result of the annual Form 470 competitive bidding process, in program year 6 (July 1, 2003-June 30, 2004), a different service provider was selected to provide most services to CEBPR members

<sup>4</sup> See also, *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas and International Business Machines, Inc* , FCC 03-313, 2003 FCC LEXIS 6820 at par 32 (2003) ("*Ysleta Order*"), where the Commission states that the FCC Form 470 is intended to allow providers to reasonably evaluate the requests and submit bids. That goal is certainly not frustrated by the ROFR.

and leaves the applicant completely free to evaluate all bids received on their individual merits, including most importantly the price of the services. It leaves that applicant completely free to select any of the bids received. Only after the evaluation and selection process has been completed does the ROFR potentially become operable to give the existing service provider the option to continue to provide services if it is willing to offer a lower price. It is impossible to imagine how the existence of this option with the existing service provider could “dampen” the competitive bidding process in any way if for no other reason than that its existence is not even known to other bidders until the competitive bidding process is completed.

It is true that the ROFR right, after the competitive bidding process is completed, could function to result in the continuation of service from the existing service provider, albeit at a lower price, than the taking of service from a new service provider. But that is a quite different consideration from the integrity of the competitive bidding process. In recognition of the economies and efficiencies inherent in providing recurring services on a longer term basis than an arbitrarily determined program year, the competitive bidding rules expressly allow for multi-year, long-term service contracts, including pre-paid contracts<sup>5</sup>, and automatic contract renewal provisions<sup>6</sup> with no annual competitive rebidding required. It makes no sense whatsoever to penalize an applicant who desires

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<sup>5</sup> Specifically, the Commission recognized that “educators often will be able to negotiate better rates for pre-paid/multi-year contracts . . .” and concluded that “eligible schools and libraries should be able to enter into pre-paid/multi-year contracts for supported services . . .” *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 9062 (1997).

<sup>6</sup> See, *Thomasville City Schools*, DA02-2014, released August 15, 2002, paragraph 3, distinguishing the signing of a new contract with the same service provider (subject to competitive bidding requirements) from a self-renewing contract extension (not subject to competitive bidding requirements).

the benefit of such a longer-term service arrangement, but with the additional potential for an annual cost adjustment downward, if a lower bid is received from another party.

The Commission has stated that competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds. *See, Ysleta Order* at par 22 (2003). The Commission has also stated that applicants must select the most cost-effective offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective. *Id.* at par 47. The ROFR promotes that goal by providing for the most cost-effective services being supplied to the applicants.

Under the competitive bidding rules, Section 54.511(a), an applicant is required to select the “most cost effective bid” but may consider factors other than cost such as the reliability of the service provider, quality of service offered and continuity of services. *See, Id.* at par 48. With respect to the evaluation of the benefits of continuing an existing service arrangement versus the selection of a new service provider, this means that an applicant may give reasonable weight to the continuation of existing services, even if a lower cost bid is received from another party. *See, Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc. of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 14 FCC Rcd 13734 (1999). Certainly, it

would make no sense whatsoever to prohibit an applicant from obtaining the benefit of a ROFR contractual provision to lower the cost of an existing contract, while permitting that same applicant to pay the higher cost as the price of maintaining existing services. The basic purpose of the competitive bidding rule, after all, is to give applicants and the e-rate program the benefit of the lowest cost possible for the services provided, rather than protect existing contractual prices

**II. The SLD Erred In Finding That Equipment Requested In Certain FRNs Is Not Being Used In Accordance With Program Rules.**

Certain FRNs (specifically 39 in number) were denied with no explanation other than that “the service/product requested in not being used in accordance with program rules ”<sup>7</sup> These FRNs all relate to the same funding request of various CEBPR members, an example of which is attached as Exhibit C. The example is taken from the Form 471 application of the Biblioteca Publica Loriza, Entity # 199651, FRN # 888183, which was denied in Exhibit A, page 46. As shown therein, the requested pre-discount amount of funding requested is \$375 00 for Internal Connections, specifically 3 Distance Learning Wiring Coaxial Connections, at the price of \$125 00 per connection

It is virtually impossible to conceive of how a very basic piece of internal connection equipment like this could be used in a manner not in accordance with program rules In a separate Loriza FRN request which is also attached in Exhibit C (and which was denied for reason of the ROFR contractual provision), funding was requested for Satellite Distance Learning Telecommunications Services, which were fully described in Note 1 of the schedule of services The requested wiring coaxial connections were simply

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<sup>7</sup> Exhibit A, pages 11, 16, 21, 26, 36, 41, 46, 51, 56, 61, 66, 71, 76, 81, 96, 101, 106, 112, 117, 122, 127, 132, 137, 147, 157, 162, 167, 172, 183, 188, 198, 203, 208, 213, 218, 223, 233, 243 and 248.

needed to provide a connection to the service provider's on-premises equipment that would be installed to deliver the distance learning telecommunications services.

The irrationality of this denial is further demonstrated by the inconsistent way in which this same funding request was dealt with in the applications of other CEPBR members. While most of this type of funding request was denied for reasons not in accordance with program rules, some of the identical requests of other CEPBR members were denied for reason of the ROFR contractual provision (Exhibit A, pp. 5, 6 and 31), some were denied for reason of insufficient information (Exhibit A, pp. 86 and 142) and others were denied for reason of the funding cap for Internal Connections (Exhibit A, pp. 193 and 228). This certainly does not show a pattern of reasoned and consistent decision making on the part of the SLD.

### **III. The SLD Erred In Finding That Insufficient Information Was Supplied In Certain FRNs.**

Certain FRNs (specifically 6 in number) submitted by two CEPBR members were denied because the "applicant has not provided sufficient documentation to determine the eligibility of this item. The site-specific discount was corrected."<sup>8</sup> The pertinent excerpts from the Form 471 applications of these two applicants (Academia Alexandra, Entity # 159117, and Liceo Aguadillano, Inc., Entity # 159117) are attached as Exhibits D and E. As shown therein, adequate information was provided to support funding for these requests. Specifically, each application funding for the following Internal Connection equipment:

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<sup>8</sup> Exhibit A, pp. 85, 86, 87 and 141, 142, 143

FRNs 888581 and 889839

HITNet Comm Server Upgrade (add processor 500 MHZ and RAM Up to 1GB)  
Enhance Router Upgrade SA Turbo  
UPS Upgrade Battery Replacement accessories  
Classroom wiring –Installation & Service  
On Site Maintenance & Technical Support

FRNs 888582 and 889840

Distance Learning Wiring, 5 Coaxial Connections

FRNs 888583 and 889841

Wireless LAN (2400 Indoor Unit 2 MBPS Signaling Rate)

All items were adequately described in the Form 470 application and are clearly eligible items under the SLD's Eligible Service List. See Eligible Services List, pp 16, 18, 20, 24, 27, and 29. Furthermore, in response to SLD staff requests, CEBPR promptly responded and supplied the requested additional information with respect to the equipment and related services. Sample responses are attached as Exhibit F<sup>9</sup>. And again, the lack of a rational basis for this rejection is shown by the fact the identical requests of other CEBPR members were denied for completely different reasons. For all other CEBPR applicants, items one and three above were rejected for reason of the ROFR contractual clause, whereas item 2 above was usually (but not always) denied for use not in accordance with program rules.

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<sup>9</sup> In supplying this additional information, CEBPR specifically advised SLD staff that it applied to all pending CEBPR member applications. This was because the SLD processing procedures would often associate material that was supplied with only certain applications, thereby resulting in multiple requests for the same information. This could perhaps explain why only certain applications were denied for lack of supporting information.

#### **IV. The Denial of Certain FRNs Because of the Funding Cap Violated FCC Rules.**

Certain FRNs (specifically 11 in number) were denied for reason that “[g]iven demand, the funding cap will not provide for Internal Connections at your approved discount level [as corrected by SLD] to be funded”<sup>10</sup> Previously, the Form 470 applications of three other CEBPR members had been denied in part for this reason and an appeal, filed December 6, 2002, of those denials is currently pending before the SLD. The pertinent sections of that pending appeal are attached as Exhibit G and incorporated by reference herein. As the appeal has now been pending before SLD for more than one year with no action, CEBPR requests that it now be resolved by the FCC in the context of this present request for review.

For schools, Section 54.505(b)(1) of the Commission’s rules expressly provides that the discount percentage “shall be measured by the percentage of their student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally approved alternative mechanism.” The rule further gives the school the option of using either the percentage of eligible students in the specific school or school district. Similarly, for libraries, Section 54.505(b)(2) expressly provides that the library shall use the percentage of students “in the public school district in which they are located.” If not located in a specific school district, the library shall use the percentage based on an average of eligible students “in each of the school districts that children living in the library’s location attend.” These rules require that the discount percentage be based on the student population in the discrete area served by the school or library.

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<sup>10</sup> Exhibit A, pp. 90, 92, 176, 178, 192, 193, 194, 227, 228, 229 and 237.

In contravention of these requirements, the SLD admittedly used region-wide data to calculate the discount percentage. According to information received from the Puerto Rico Department of Education, there are 84 school districts in Puerto Rico which are grouped into 11 administrative regions. It is this latter “regional weighted discount rate, which is what the SLD uses to determine the discount rate of public libraries.”<sup>11</sup> Moreover, not only is the wrong region-wide measurement area used, but also the validity of the regional-wide data is in question. According to information received by CEBPR from the Puerto Rico Department of Education, PRDOC considers the region-wide data flawed because it is based on the number of students who actually participate in the school lunch program, rather than the number of students eligible to participate.

CEBPR recognizes that the determination of the correct discount rate in Puerto Rico presents some unique issues because, under local Puerto Rico law, all students are considered eligible for the national school lunch program. It is just for this reason that, as set forth in Exhibit G, CEBPR requested clarification from USAC of the correct factors and procedures to be used in the calculation of the correct discount rate.<sup>12</sup> Not only was such clarification not forthcoming, but also the attached denials then used the one measurement base (regional-wide data) which is not permitted by FCC rules.

**V. Denial Inconsistent and Inadequately Explained.**

The denial of the applications by SLD contained an inadequate explanation of the basis for the denial. Fundamental to any system of decision-making is a requirement that

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<sup>11</sup> See Exhibit G, 8/16/02 e-mail from Adolfo Arauz, SLD; and 8/21/02 e-mail to Adolfo Arauz, SLD.

<sup>12</sup> See Exhibit G, Letter from Ramsey L. Woodworth, Esquire to D. Scott Barash, Esquire, dated October 2, 2002.

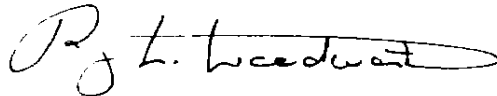


the decisionmaker states adequate findings of fact and reasons for the decision. The explanation given in this case was insufficient to explain the basis of the denial. This is true especially as the denials are seemingly arbitrary, capricious, contrary to previous Commission precedent and not uniformly applied to all similar FRNs. If nothing else, the denials should be remanded back to the SLD for further explanation of the basis of the denials.

### **CONCLUSION**

For these reasons, the attached action of the SLD should be reversed and rejected applications remanded to the SLD for processing consistent with FCC rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. L. Woodworth", with a stylized, sweeping flourish at the end.

Ramsey L. Woodworth  
Michelle A. McClure  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave., N.W., Suite 200  
Washington, D.C. 20036-3101  
Tel: (202) 728-0400  
Counsel for Consorcio de Escuelas y Bibliotecas de  
Puerto Rico

January 23, 2004

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